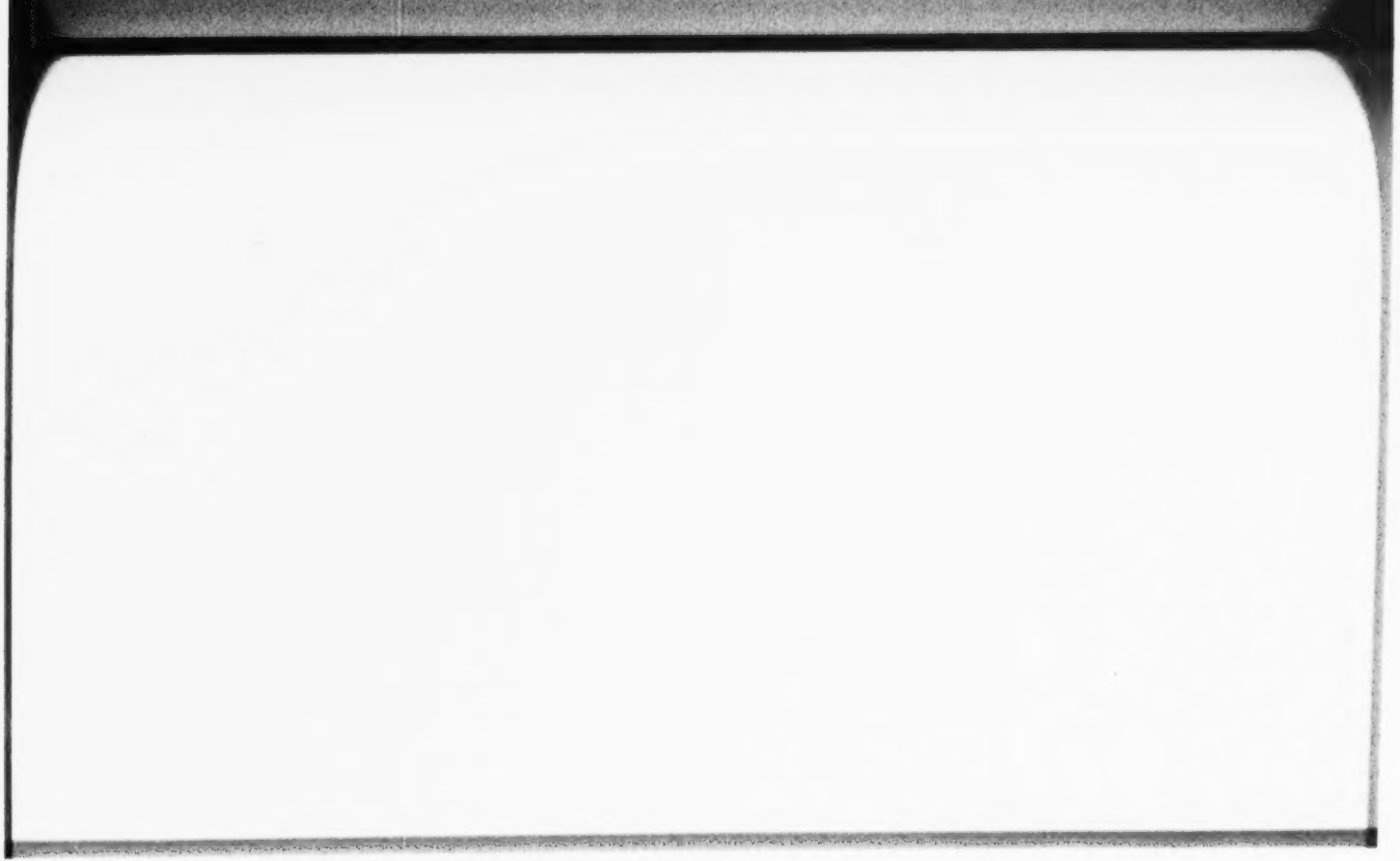

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 73-438

MOBIL OIL CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS SHELL OIL COMPANY, *ET AL.*, IN OPPOSITION

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BRIEF OF RESPONDENTS SHELL OIL COMPANY, *ET AL.*, IN OPPOSITION

Shell Oil Company, *et al.* (Shell, *et al.*), respectfully submit their brief in opposition to the petition filed herein for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 8, 1973.

QUESTION PRESENTED

After extensive area rate hearings the Federal Power Commission fixed just and reasonable rates for producer

gas sales in the Other Southwest Area. On appeal the Fifth Circuit held that the Commission's order was supported by substantial evidence, but that the Commission had taken action in this case with respect to certain factors entering into the computation of the rates which was inconsistent with its action in other areas. Accordingly, the court exercised its equitable powers to modify its "enforcement" of the Commission's order by making it clear that under its decree the Commission had authority to make such changes in its order as it found, in the light of the evidence and its "evaluation of the gravity of our national energy crisis," to be in the public interest (App. B, p. 29).

Petitioner contends the court below should have reversed and remanded instead of making its qualified order. Petitioner does not question the power of the court to enter its order if the decision of the Commission is supported by substantial evidence. Accordingly, the basic question presented is whether the Commission's order is supported by substantial evidence.

STATEMENT OF THE CASE

These proceedings commenced on February 28, 1967 with the institution by the Federal Power Commission of the *Other Southwest Area Rate Cases* to establish just and reasonable rates for producer gas sales in the Other Southwest Area (37 F.P.C. 400).[1] In 1962 this area provided approximately 14 percent of the natural gas sold in interstate commerce (R. 10,911-10,912). Fifty-

[1] "Other Southwest Area" is a group of six areas, geographically, geologically, and economically distinct, lumped together by FPC for administrative convenience. It includes all of (1) Arkansas, (2) Mississippi, (3) "Other Oklahoma" (the 56 counties in Southern and Eastern Oklahoma not covered by FPC's order in the *Hugoton-Anadarko Area Rate Case*), (4) Texas Railroad Commission Districts Nos. 5, 6 and 9 in Northeast Texas, (5) four counties in Northwest Alabama and (6) all of Louisiana north of the 31° parallel.

five days of hearings were conducted before a Hearing Examiner where 6,939 pages of testimony and 117 exhibits were received (R. 11,332). Following the issuance of the Examiner's Initial Decision on September 22, 1969, the Commission entered its opinion and order on October 29, 1971 [2] and a modified order on January 17, 1972,[3] fixing 73 separate prices for this heterogeneous area depending upon vintage and geographic location. Its order included a refund discharge provision patterned after the one entered in *SoLa II*,[4] providing that refund obligations could be worked off by dedicating new reserves to the interstate market—a credit of one cent for each thousand cubic feet of new gas so dedicated.

On appeal the court below reviewed the methods followed by the Commission and the underlying evidence. It held that the methods were permissible and that substantial evidence supported the end result. Accordingly, the court entered an order "enforcing" the Commission's decision. Nevertheless, the court noted that in certain respects the Commission had taken action here which was inconsistent with its action in other area rate proceedings. Thus, the court pointed out that the rates established in this case were based on 1962 cost data, whereas in other proceedings more current data has been used (App. B, pp. 7-8); [5] that, as to flowing gas, the Commission in this case used a rate of return of 10.5 percent, whereas in *Permian* [6] 12 percent, and in *SoLa II* 15 percent, were

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[2] Opinion No. 607 (R. 12,083-12,208).

[3] Order on Rehearing, Opinion No. 607-A (R. 12,331-12,339; 12,351-12,353).

[4] *Placid Oil Co.* v. *F.P.C.*, —— F.2d —— (5th Cir. No. 71-2761, decided April 16, 1973). (*Southern Louisiana Area Rate Cases*, now pending on petitions for writs of certiorari before this Court in Nos. 73-437, 73-457 and 73-464).

[5] "App. B" herein refers to Appendix B to Mobil's Petition for a Writ of Certiorari.

[6] *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

used (App. B, p. 23); that in this case no additional allowance was made as to flowing gas for exploration and development, whereas in *SoLa II* such additional allowance was made (App. B, pp. 23-24); that a different method of apportioning expenses between oil and gas than that used in *SoLa II* was used in the instant case—to the disadvantage of the producers (App. B, pp. 24-25). The court also found that the supply shortage had grown substantially worse since the record closed in this case (App. B, pp. 8-11).

In view of these circumstances the court adopted the procedure followed in *SoLa I*[7] of modifying its enforcement of the Commission's order by making it clear that under its decree the Commission should have full power to make such changes in its order as it found, in the light of the evidence and "of its evaluation of our national energy crisis" (App. B, p. 29), to be in the public interest.

REASONS FOR DENYING THE WRIT

Mobil alone, of the many producers who were petitioners in the court below, seeks certiorari by this Court. Its contentions are based entirely upon an appraisal of the large factual record before the Commission and the court below. No one of these contentions, we submit, raises any point warranting review by this Court. This is particularly true because the decree of the court below is framed to permit the Commission to reopen and reexamine the entire case and to make any adjustments in rates, past or prospective, which the Commission finds to be in the public interest. Mobil's contentions are as follows:

(1) Mobil repeats the contention it makes in its peti-

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[7] *Southern Louisiana Area Rate Cases* (*Austral Oil Co.* v. *Federal Power Commission*), 428 F.2d 407; on rehearing, 444 F.2d 125 (5th Cir. 1970); *certiorari denied, sub nom., Municipal Distributors Group* v. *Federal Power Commission*, 400 U.S. 950 (1970).

tion for a writ of certiorari in No. 73-437, namely, that the portion of the Commission's order which permits refund obligations to be discharged by a commitment of one cent per Mcf of new gas reserves dedicated to the interstate market is discriminatory (Pet., pp. 13-14).[8] This contention is answered in the Brief in Opposition filed by Exxon Corporation, *et al.*, in Nos. 73-437, 73-457 and 73-464 now pending before this Court (pp. 14-16). As there pointed out, Mobil is disadvantaged by the Commission's order in this respect only because of its early voluntary settlement; further, the Commission's order complies with the teachings of *Permian*.

(2) Mobil urges that the Commission allowed a lower rate of return on flowing gas in this area than in other areas and followed a different and disadvantageous formula in allocating expenses between oil and gas (Pet., pp. 14-16); that it did not make provision for possible increased royalty expense (Pet., pp. 16-19); and that the moratorium on increased rate filings until July 1, 1976 was unreasonable (Pet., pp. 19-20). The court below, after a careful review of the record, held that the Commission's order was supported by substantial evidence. Nevertheless, it noted the inconsistencies in the Commission's order referred to above and, accordingly, framed its decree to permit the Commission to re-examine its order, to take additional evidence if appropriate, and to correct any deficiencies in its order (App. B, pp. 8, 26, 19). It also pointed to the opportunity each producer has to seek special relief (App. B, pp. 21, 23, 28).

(3) Mobil further contends that, in view of the inconsistencies the court found in the Commission's decision, the court erred in failing to enter a decree reversing and remanding the proceedings rather than entering

[8] In its initial Opinion No. 607 the Commission did not include a refund discharge provision (R. 12,123), but added it on rehearing in order to avoid discrimination between areas (R. 12,333).

a decree preserving to the Commission power to amend its order, both as to past and future rates, if the Commission found this to be in the public interest (Pet., pp. 20-22). This, however, was the exact procedure followed by the court below in *SoLa I* and which resulted in the Commission's amended orders in that case which were upheld by the court below in *SoLa II*. Petitions for writs of certiorari to review the decision in *SoLa I* were denied by this Court (Nos. 669, 680-685, 691 and 692, October Term, 1969, 400 U.S. 950). The court's order here properly left these proceedings in a situation where the inconsistencies in the Commission's order can be corrected. The court's authority to render such a decision, and the Commission's authority to act upon it, is unquestionable (*Ford Motor Company* v. *National Labor Relations Board*, 305 U.S. 364, 373, 375 (1939); *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 128 F.2d 481, 484 (7th Cir. 1942).

(4) Finally, Mobil contends (Pet., pp. 12-14) that the decision by the court below is in conflict with the decision of the Court of Appeals for the District of Columbia in the *Texas Gulf Coast Area Natural Gas Rate Cases*, —— F.2d ——, (D.C. Cir. No. 71-1728, decided August 24, 1973). There is no conflict (see Brief for Respondents Exxon Corporation, *et al.*, in Opposition in Nos. 73-437, 73-457 and 73-464, pp. 19-22).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The within Brief In Opposition has been served in accordance with Rule 33 by mailing three (3) copies thereof, postage prepaid, to all counsel of record and to the Solicitor General of the United States this 30th day of October, 1973.

/s/ Justin R. Wolf
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